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IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF CENTRAL STATES

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1002(37) and 1301(a)(3).[1] Central States is the largest

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

multiemployer defined benefit pension plan in the United States with assets of $19.7 billion.[2] Central States has over 187,000 active participants, over 75,000 vested inactive participants, and over 199,000 retirees. These participants and retirees reside in every judicial circuit in the United States. For example, as of November 6, 2002, Central States had over 35,000 active participants residing in the Seventh Circuit (Illinois, Indiana, and Wisconsin) and over 16,000 active participants residing in the Fifth Circuit (Louisiana, Mississippi, and Texas).

Like most multiemployer defined pension plans, Central States has prohibited reemployment rules. These rules provide that a retiree that engages in prohibited reemployment, for example, working in a position similar to positions covered by collective bargaining agreements in effect in the same geographic area, will have his pension suspended during the duration of the prohibited reemployment. This prevents retirees from "double dipping," *i.e.*, drawing a pension while continuing to do work in the same industry from which the retiree just "retired." On March 13, 2002, Central States amended its pension plan, effective July 1, 2002, to provide a broader definition of prohibited employment for any participant retiring after the effective date of the amendment.[3] In other words, more jobs would be encompassed within the definition of prohibited reemployment,

[2] All data is as of December 31, 2001, except as otherwise indicated.

[3] Unlike the amendment adopted by Petitioner, Central States did not apply its amendment to existing retirees. However, the conflict between the Fifth Circuit and the Seventh Circuit affects Central States' amendment as well because the reasoning of the Seventh Circuit would likely prohibit the application of the amendment even as to participants who had not retired as of the effective date of the amendment. *See Heinz*, 303 F.3d at 806 n.6 (suggesting that its holding is not limited to those already retired before the amendment by indicating that the amendment could apply prospectively to the "benefit payment attributable to service after the amendment").

thereby making it more likely that a retiree's pension benefits would be suspended. In enacting the amendment to the prohibited reemployment rules, Central States' Board of Trustees relied in part on the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), which held that suspensions of benefits under prohibited reemployment rules are not subject to the "anti-cutback" provision of ERISA, 29 U.S.C. 1054(g).

Subsequent to Central States' decision to amend the prohibited reemployment rules, the Seventh Circuit in the instant case held that a suspension of benefits is subject to the anti-cutback provision of ERISA. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002). As a result, Central States and its participants are potentially subject to two different rules. On the one hand, if the Fifth Circuit's approach is followed, Central States' amendment to the prohibited reemployment rules is valid. However, if the Seventh Circuit's approach is followed, Central States is at risk that a court would find the amendment to the plan constitutes a cutback in benefits prohibited by 29 U.S.C. § 1054(g). Central States has thousands of participants in both the Fifth and the Seventh Circuits, making the conflict particularly severe in its application. As a result, Central States is in a conundrum when it must make a benefit determination concerning a suspension of benefits. If Central States applies a different rule to participants based upon the participant's circuit of residence, there is a risk that Central States' benefit determination would be found to be arbitrary and capricious because a different rule would be applied to similarly situated participants with no distinction in their benefit claims except for their place of residence. Similarly, because ERISA's venue provision provides that venue is appropriate, among other places, "where the plan is administered," 29 U.S.C. § 1132(e)(2), a participant may choose to sue Central States within the Seventh Circuit (where Central States is administered) even though the participant may reside

in a different judicial circuit. In short, Central States is caught between the Scylla of risking an arbitrary and capricious finding should it apply the rule based upon circuit of residence and the Charybdis of being prevented from applying the amendment even though Central States believes that the amendment is not subject to the anti-cutback rule.[4]

SUMMARY OF REASONS FOR GRANTING THE WRIT

There is a conflict between the decision below, *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002), and the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), on the question of whether an amendment to rules regarding prohibited reemployment constitutes an impermissible cutback of accrued benefits in violation of 29 U.S.C. § 1054(g)(2). This conflict regarding this important issue has created legal uncertainty making it impossible for pension plans to be administered. Should the plan follow *Heinz*, it will be at risk of being found to violate the terms of the plan (by failing to apply the amendment). If the plan follows *Spacek*, the plan is at risk of being found to have impermissibly cutback an accrued benefit. However, as a close analysis of the pertinent statutory sections and regulations demonstrates, the application of prohibited reemployment rules to suspend pension benefit payment does *not* affect the calculation of a participant's accrued benefit. Since 29 U.S.C. § 1054(g)(2) is violated only by an amendment that "reduces" or "eliminates"

[4] In part because of this dilemma and the legal uncertainty surrounding this issue, Central States has recently rescinded the amendment to the prohibited reemployment rules. Thus, until this Court agrees to resolve the conflict between the circuits, Central States would be deterred from taking an act that it believes is allowed under ERISA. Central States' determination as to the best way to structure its plan in the interests of preserving assets and serving its participants has been unnecessarily chilled by the legal uncertainty and conflict created by the *Heinz* decision.

an accrued benefit, a suspension of benefits, by definition, does not violate the statute because a suspension of benefits does not affect the amount of a participant's accrued benefit at all. The Court should grant the Petition for a Writ of Certiorari to resolve the legal uncertainty regarding this issue.

REASONS FOR GRANTING THE WRIT

As the Court below acknowledged, there is a clear split between the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), and the Seventh Circuit's decision below on the issue of whether an amendment to the rules regarding prohibited reemployment for early retirement constitutes a cutback in accrued benefits in violation of 29 U.S.C. § 1054(g)(2). *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 803 & n.1 (7th Cir. 2002). The decision below also conflicts with the Sixth Circuit's decision in *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995), which held that an amendment to prohibited reemployment for early retirement does not violate 29 U.S.C. § 1054(g) because a suspension of benefits is separate and distinct from an elimination or reduction of benefits. Resolution of this conflict between the circuits on a pure question of law is the paradigm case for granting certiorari.

The issue is also one of critical importance. Until this Court resolves the issue, pension plans and their participants alike will be uncertain as to their rights. Because a single plan such as Central States may have participants throughout the country, it is impossible for a plan to make consistent benefit determinations without either risking a determination that enforcement of an amendment constitutes a cutback, or risk violating the terms of the plan by applying one version of the plan to certain participants and another version of the plan to other participants based solely on the participant's place of residence. Because ERISA's venue provision, 29 U.S.C. § 1132(e)(2), permits venue, among other places, "where the

plan is administered," and where the participant "may be found," the choice of forum will be outcome determinative, and reaching the courthouse door first, rather than the rule of law, will be paramount.

In addition to the prejudice to plans and participants through a delay in resolving this issue, delay in resolving this issue will not result in further assistance to the Court in resolving the issue. As stated above, the question presented is a pure question of law that is not dependent on a variety of factual circumstances to bring the question of law into focus. Simply put, the question is whether, under ERISA, a suspension of benefits should be treated the same as a reduction or elimination of benefits. As illustrated below, the Seventh Circuit was incorrect in equating a suspension of benefits with a reduction or elimination of benefits.

As detailed in *Spacek*, ERISA itself, its regulations, and the legislative history all distinguish a suspension of benefits from a reduction or elimination of accrued benefits. For example, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), classifies prohibited reemployment rules as a suspension of benefits, and expressly provides that a benefit suspended under a prohibited reemployment rule "shall not be treated as a forfeitable accrued benefit." In addition, various statutory and regulatory provisions refer to both reductions of benefits and suspensions of benefit payments. *E.g.*, 29 U.S.C. §§ 1441(a), 1341a(d) and 1342(d); 29 C.F.R. § 2520.104b-4(a)(1)(iii). Further, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), and the regulations promulgated under that provision, provide that for multiemployer plans, suspensions of benefit payments after *normal* retirement age is limited to participants working in the same industry, in the same trade or craft, and the same geographic area covered by the plan. The regulations make it plain that the limitations placed on suspension of benefit payments apply only after a participant reaches *normal* retirement age, and that the limitations on suspension imposed by Section 203(a)(3)(B)(ii) do not apply to the suspension of *early* retirement benefits. 29 C.F.R. § 2530.203-3(a); *Whisman*, 55 F.3d at 1146. Thus, the statute and the regulations give a plan broader authority to suspend benefits prior to normal retirement age.

The regulations also state that with respect to early retirement benefits "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f); *Spacek*, 134 F.3d at 290. In other words, a suspension of benefits is treated differently than a reduction of benefits because a suspension of benefits does *not* result in a reduction of the accrued benefit. Therefore, because 29 U.S.C. § 1054(g)(2) only applies if an amendment "eliminates or reduces" an early retirement benefit, and because a suspension is treated as *not* reducing the accrued early retirement benefit, an amendment to the suspension rules does not violate 29 U.S.C. § 1054(g)(2). The Seventh Circuit's conclusion that an amendment of the suspension rules constitutes a cutback is simply wrong because its premise is that a suspension either "reduces" or "eliminates" an accrued benefit. However, because a suspension does not affect the calculation of the accrued benefit for purpose of early retirement, a suspension neither "reduces" nor "eliminates" an accrued benefit. Therefore, an amendment to the suspension rules neither "reduces" nor "eliminates" an accrued benefit because the accrued benefit is unaffected by the suspension rules regardless of the form of those rules.

CONCLUSION

The conflict between the Fifth Circuit and the Seventh Circuit has created a clear split in the circuits on a pure question of law. Absent resolution of this question of law, pension funds will either be forced to forego their right to protect the solvency of the pension funds by broadening the scope of the prohibited reemployment rules, or be subject to conflicting rules concerning whether the amendment should apply to a particular participant. This Court should grant the Petition for a Writ of Certiorari to resolve this critical issue.

Respectfully submitted,

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